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No. 82-121

In the Supreme Court of the United States

OCTOBER TERM, 1982

ARCHIE PELTEMAN, PETITIONER

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court of appeals may decide the merits of an appeal on a motion to affirm.

2. Whether the Federal Maritime Commission has jurisdiction under Sections 15, 16 or 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 or 816, over a vessel owner's discharge of a marine radio operator based on his refusal to join the radio operators' union within 30 days of hiring, as required by a collective bargaining agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-181

ARCHIE PELTZMAN, PETITIONER

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a-4a) are not reported. The order of the Administrative Law Judge dismissing petitioner's complaint (Pet. App. 5a-22a), and the order of the Federal Maritime Commission adopting the dismissal of the complaint (Pet. App. 23a-35a), are reported at 20 Shipping Reg. Rep. (P & F) 939 and 20 Shipping Reg. Rep. (P & F) 1479, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on March 29, 1982, and a petition for rehearing was denied on May 19, 1982 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE

Sections 15, 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 and 816, are set forth in pertinent part in Appendix A, *infra*, 1a-3a.

STATEMENT

Petitioner seeks review of the Federal Maritime Commission's dismissal of his complaint on the ground that it failed to allege a violation of the Shipping Act of 1916, 46 U.S.C. 801 *et seq.*, and, to the extent that it sought reparation, that it was not filed within the applicable period of limitations. The underlying facts are set forth in *Peltzman* v. *Central Gulf Lines, Inc.*, 86 L.R.R.M. (BNA) 2127 (S.D. N.Y.) (summary judgment), rev'd in part, 497 F.2d 332 (2d Cir.), on remand, 88 L.R.R.M. (BNA) 2924 (S.D.N.Y. 1974), aff'd, 523 F.2d 96 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

In 1949, the Coast Guard refused to issue petitioner, a marine radio officer, a radio operator's license on the ground that he was either a member of the Communist Party or a Communist Party sympathizer. Without a license, petitioner could not continue to work in the Merchant Marine, and in 1950 he was expelled from the American Radio Association, a labor union, for failure to pay his dues. After filing suit against the Coast Guard in 1967, petitioner secured a new license and the Union issued him a "permit card," allowing him to sail for one year without paying the Union's $2,000 initiation fee. Thereafter, however, the Union demanded the full fee. Petitioner refused to pay the initiation fee, claiming that as a former member he should be required to pay only the lesser "withdrawal fee." 497 F.2d at 333. In May 1971, his employer, respondent Central Gulf Lines, Inc., discharged him pursuant to the "union security clause" contained in its collective

bargaining agreement with the Union. This clause provided (Pet. App. 11a):

> The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring.

Petitioner then began a series of legal actions. He first took his claim to the National Labor Relations Board, alleging that the Union's refusal to clear him for employment on a Central Gulf vessel and Central Gulf's subsequent refusal to employ him were unfair labor practices. But the Regional Director found the union security clause valid and refused to file a complaint, and the General Counsel affirmed that decision (Pet. App. 11a-12a). The Second Circuit dismissed petitioner's appeal from the bench, *Peltzman* v. *NLRB*, No. 72-1091 (Apr. 4, 1972), and this Court denied a petition for certiorari, 409 U.S. 887 (1972). At the same time petitioner was seeking relief from the NLRB, he was also pursuing a breach of contract action against the Union in New York State court. That suit was dismissed on the ground that the NLRB had exclusive jurisdiction. *Peltzman* v. *American Radio Association*, 69 Misc.2d 17, 327 N.Y.S.2d 505 (Sup. Ct. 1971), aff'd mem., 40 A.D.2d 631, 335 N.Y.S.2d 998 (App. Div. 1972), cert. denied, 411 U.S. 916 (1973). Petitioner next sought relief against his former employer, respondent Central Gulf Lines, Inc., in federal court, where he "raised a myriad of claims * * * based on maritime law, the New York and federal constitutions, the antitrust laws, and the collective bargaining agreement * * *" (497 F.2d at 333). In essence, petitioner's claim was that Central Gulf Lines had unlawfully acceded to the Union's request that it discharge petitioner for failing to pay the $2,000 initiation fee. All of peti-

tioner's claims were rejected. *Peltzman* v. *Central Gulf Lines, Inc.*, 86 L.R.R.M. (BNA) 2127 (S.D. N.Y.) (summary judgment), rev'd in part, 497 F.2d 332 (2d Cir.), on remand, 88 L.R.R.M. (BNA) 2924 (S.D.N.Y. 1974), aff'd, 523 F.2d 96 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

Petitioner initiated the instant action by filing a complaint with the Federal Maritime Commission against approximately 185 parties, including the American Maritime Association and the Pacific Maritime Association (maritime multiemployer bargaining organizations), the American Radio Association and the Radio Officers Union (unions representing marine radio operators) and several ocean common carriers, including respondent Central Gulf. Pet. App. 5a-6a. Petitioner alleged (Pet. App. 7a-8a):

> This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and "union" membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to "join" a union or be discharged from employment if they do not "join" a union which has an exclusive preferential hiring hall agreement, commonly called a pre-hire, or closed shop agreement, requiring membership as a condition of employment or referral by a union as a condition of employment.

He contended that such union security agreements violated Sections 15, 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 and 816. Since the collective bargaining agreements containing the union security provisions had not been approved by the FMC,[1]

[1] Section 15 of the Shipping Act of 1916, 46 U.S.C. 814, requires that certain types of agreements among ocean common carriers be approved by the FMC and makes it unlawful to

petitioner asked that they be declared unlawful and unenforceable, and that he be granted reparation.

The Commission's Chief Administrative Law Judge (ALJ) dismissed petitioner's complaint on the grounds that the Commission lacked jurisdiction over it and that it was barred by the two-year statute of limitations contained in Section 22 of the Act, 46 U.S.C. 821 (Pet. App. 15a-22a). The Commission affirmed the ALJ's order of dismissal subject to certain modifications and clarifications (Pet. App. 23a-35a).

On petition for review, the court of appeals granted the Commission's motion for summary affirmance (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. Petitioner contends (Pet. 14-16) that the court of appeals violated his procedural rights by granting the Commission's motion for summary affirmance. Summary disposition of an appeal on motion, however, is sanctioned by Rule 16 of the Rules of this Court as well as by decisions of the courts of appeals construing Fed. R. App. P. 27. See, *e.g.*, *Antal* v. *District 5, UMW*, 451 F.2d 1187 (3d Cir. 1971); *Sanders* v. *Crouse*, 429 F.2d 37 (10th Cir. 1970); *United States* v. *Fields*, 423 F.2d 1221 (4th Cir. 1970). See also Fed. R. App. P. 2.[2] Moreover, the

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carry out such agreements "before approval or after disapproval."

[2] Petitioner relies (Pet. 15-16) on *Kemph* v. *Estelle*, No. 79-2565 (5th Cir. Nov. 9, 1979) (App. B, *infra*, 4a-7a), in which the court denied a motion to dismiss an appeal. The decision in that case, however, was grounded largely on the operating procedures of the Fifth Circuit and that court's

procedure followed by the District of Columbia Circuit in this case is specifically authorized by its Rule 6(g).[3]

Petitioner had ample opportunity to present his argument to the court of appeals. The court decided the appeal only after petitioner had filed a response to the Commission's motion for summary affirmance and a further response in answer to Central Gulf's pleading in support of the Commission's motion (see Pet. App. 1a).[4] Neither the due process clause nor the Federal Rules of Appellate Procedure requires more.[5]

Rule 20 (App. B, *infra*, 5a-7a). In any event, the Fifth Circuit withdrew the decision from publication after it was published in the advance sheets, 606 F.2d 518*, editors note, and the case subsequently was decided without oral argument under Rule 18 of the Rules of the Fifth Circuit. *Kemph* v. *Estelle*, 621 F.2d 162 (1980).

[3] District of Columbia Circuit Rule 11, which petitioner cites (Pet. 14-15), deals with the disposition of fully briefed cases without oral argument, rather than disposition on a motion for summary affirmance prior to full briefing.

[4] Petitioner's opening brief and joint appendix also were already on file. Pet. 9.

[5] The procedure followed by the Commission was equally proper. Where, as here, no material question of fact was raised, it was appropriate for the Commission to rule on petitioner's complaint without holding evidentiary hearings, and to dismiss the complaint where the alleged facts, if proven, would have established no violation of statutes administered by the Commission. See, *e.g.*, *Delaware River Port Authority* v. *FMC*, 536 F.2d 391, 392 (D.C. Cir. 1976); *Outward Continental North Pacific Freight Conference* v. *FMC*, 385 F.2d 981, 984 n.9 (D.C. Cir. 1967); *Persian Gulf Outward Freight Conference* v. *FMC*, 375 F.2d 335, 341 (D.C. Cir. 1967).

Nor does this Court's decision in *Boag* v. *MacDougall*, No. 80-6845 (Jan. 11, 1982) (Pet. 16), suggest that the Commission's dismissal of petitioner's complaint was improper. In that case, this Court reversed a district court's dismissal of

2. Petitioner's contention (Pet. 19) that the Commission has jurisdiction over his claim also lacks merit. Sections 15, 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 and 816, were enacted to regulate commercial relationships among common carriers by water and other agencies of maritime transportation and shippers,[6] and the Commission's role as "public arbiter of competition in the shipping industry," *FMC* v. *Pacific Maritime Association*, 435 U.S. 40, 53 (1978), must be understood in that light. To be sure, "it is quite untenable to suggest that collective-bargaining contracts *never* control, regulate, prevent, or destroy competition" (*ibid.*; emphasis by the Court), and agreements and practices ordinarily subject to the Commission's jurisdiction are not exempt merely because they involve a labor union or a collective bargaining agreement.[7] By the same token,

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a prisoner's pro se complaint where the only ground stated for dismissal was erroneous as a matter of law, and no other sufficient ground for dismissal appeared on the record before the Court. Here, both the Commission and the court of appeals articulated a correct basis for dismissal of the complaint, which was amply supported by the record.

[6] Section 1 of the Shipping Act of 1916, 46 U.S.C. 801, defines persons covered by the Act to include common carriers by water in international and offshore domestic trades and persons who provide terminal services for them. Section 15 requires the Commission to review and approve specific categories of agreements among covered persons before they may be implemented. 46 U.S.C. 814. Sections 16 and 17 prohibit covered persons from engaging in certain types of discriminatory or unreasonable practices. 46 U.S.C. 815 and 816.

[7] But see the Maritime Labor Agreements Act of 1980, Pub. L. No. 96-325, 94 Stat. 1021 *et seq.* (MLAA), which expressly excludes most labor agreements from the operation of Section 15 of the Shipping Act. By virtue of Section 6 of the MLAA, 94 Stat. 1022, however, it does not apply to this case, which was initiated four days before the statute was enacted.

however, collective bargaining agreements of carriers that do not bear on intercarrier competition in a manner that affects shippers do not come within the coverage of the statute. See *id.* at 57. Moreover, the Commission must be particularly careful in asserting jurisdiction when the agreement in question goes to the heart of sensitive labor relations issues within the jurisdiction of the National Labor Relations Board, such as the union security clause at issue here. See *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 278 (1968); cf. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174 (1962).[8] Accordingly, even assuming that the multiemployer collective bargaining agreements challenged by petitioner had the threshold effects on intercarrier competition necessary to bring them within the scope of Section 15, the Commission properly held them to be within the nonstatutory labor exemption to Section 15

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[8] Petitioner refers to many legal provisions outside the Commission's jurisdiction, *e.g.*, the labor laws, the Civil Rights Act of 1964 (Pet. 3, 11), an international convention (Pet. 13-14), and certain laws relating to ship subsidies, which are administered by the Maritime Administration, a division of the Department of Transportation (see Pub. L. No. 97-31, 95 Stat. 151) (Pet. 11-12, 19-20). The Commission's jurisdiction under the Shipping Act, however, must arise from the language of that statute, rather than from some other obligation that may exist elsewhere in the law. In short, petitioner's claims that the Commission should assert jurisdiction because the union security clauses violate "the public policy of the Shipping Act" (Pet. ii, 17) are misguided. As this Court has held, words such as "public interest" in regulatory statutes are not to be construed in the abstract, but must be restricted to the purpose of the regulatory legislation. *NAACP* v. *FPC*, 425 U.S. 662, 669-671 (1976).

jurisdiction. See *United Stevedoring Corp.* v. *Boston Shipping Association*, 16 F.M.C. 7 (1972).

Finally, absent any allegation of injury to shippers or any other class of persons protected by the Shipping Act, the Commission correctly concluded that the complaint stated no claim under Sections 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 815 and 816.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

APPENDIX A

SHIPPING ACT, 1916 (46 U.S.C. 801 *et seq.*)

Section 15, 46 U.S.C. 814

Every common carrier by water, or other person subject to this [Act], shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. * * *

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this [Act], and shall approve all other agreements, modifications, or cancellations * * *

* * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation * * *.

* * * * *

Section 16, 46 U.S.C. 815

* * * * *

It shall be unlawful for any common carrier by water, or other persons subject to this [Act], either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * * * *

Section 17, 46 U.S.C. 816

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination

or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this [Act] shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-2565

ALBERT ALAN KEMPH, JR., PETITIONER-APPELLANT

v.

W. J. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Nov. 9, 1979

Appeal from the United States District Court for the Northern District of Texas

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

Appellant, a Texas prisoner, was denied a writ of habeas corpus by the district court. The court granted a certificate of probable cause. After appellant's brief was filed on appeal, respondent-appellee filed a "Motion to Dismiss Appeal." Fed.R.App.P. 27.

Respondent does not attack by the motion any procedural default in the appeal, but rather addresses the merits of appellant's claim. The merits of an appeal are to be presented to the Court by briefs filed in accordance with the provisions of Fed.R.App.P. 28, not by motion under Fed.R.App.P. 27.

"Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course."

Fed.R.App.P. 27, Notes of Advisory Committee on Appellate Rules. Relief contemplated by the procedure established under Fed.R.App.P. 28, on the other hand, generally requires a decision on the merits, for which the parties are given a full opportunity to address all substantive issues, and to respond to the arguments of their adversaries. Attempts to have the Court dispose of the merits of a case by motion are inappropriate for several reasons.

The Court's procedure for handling emergency and administrative matters which are proper subjects for motion practice is markedly different from the procedure followed in determining the merits of an appeal.

The judicial priorities accorded motions and the hearing of cases on the merits differ. There is no reason why an appellee should be permitted to alter those priorities by the way in which it responds to individual appeals.

An appellant is afforded 14 days to file a reply brief to an appellee's brief, but only seven days to file a response in opposition to a motion. Fed.R.App. P. 27(a), 31(a). There is no reason why appellee should be permitted to shorten appellant's time for response to its arguments by filing a motion addressing the merits rather than by filing a brief.

The Federal Rules of Appellate Procedure have been carefully developed to provide what has been determined to be the best way for the merits of cases to be presented to the Court. There is no reason why respondent should be permitted to subvert those rules.

If expediting the appeal is appropriate, or a particular case lends itself to some treatment different from the regular routine for processing appeals, the rules are flexible enough to meet the needs of the particular case. Nothing appears in the motion before

us to justify a failure of appellee to conform to the rules and the regular practice in this Court.

Motions are generally handled without oral argument and decided by a quorum of the court. Fifth Circuit Internal Operating Procedures Manual § IV.E. (Oct. 1, 1979 rev. ed.). Under the well-known Local Rules and operating procedures of this Court, an appeal cannot be decided without oral argument by less than a unanimous court. Fed.R.App.P. 34(a) now provides that oral argument shall be allowed in all cases unless after examination of briefs and record, a panel of three judges "shall be unanimously of the opinion that oral argument is not needed." The filing of a motion addressed to the merits of an appeal tends to thwart these rules.

Local Rule 20 of this Court does provide for the dismissal of appeals on interlocutory motions if "it shall appear to the Court that the appeal is frivolous and entirely without merit." It appears to this panel, however, that the attorneys general in some states in this Circuit are simply abusing this rule by bringing motions alleging as frivolous that which only lacks merit. The motion in this case is six pages long and cites over a dozen cases. Regardless of the merit of petitioner's appeal, such extended argument reveals that it is probably not frivolous. Frivolity should leap from the mere statement of the issues on appeal. If argument is necessary, the issues can only questionably be called frivolous, within the meaning of rule 20. Indeed, the United States District Court has issued a Certificate of Probable Cause for this appeal under Fed.R.App.P. 22(b), an action which was not opposed by the state below, and which could not have occurred had the district judge regarded the appeal as frivolous.

In any event, the appeal could be dismissed under rule 20 *only* if it were frivolous, and not on the ground that the appeal, though not frivolous, lacked merit. Three judges would be involved in denial of the motion. Fed.R.App.P. 27(c). Three other judges would then be involved after briefing in a decision that the appeal lacked merit. Such duplication of judicial effort is inefficient and wasteful of scarce judicial resources. The imposition of that duplicate effort is a burden on the other litigants before this Court who take their rightful place according to the rules.

Flexibility is needed in court rules to enable the Court to handle properly the great variety of cases that come before it. Flexible rules tend to invite abuse. The cooperation of counsel appearing before this Court in eliminating unnecessary activity and following the spirit and intent of the rules is encouraged.

The motion to dismiss is denied, appellee is directed to file a brief in accordance with the rules, and appellant is accorded the full period for filing a reply brief. Fed.R.App.P. 31(a).

MOTION TO DISMISS DENIED.

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